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CLIENT MEMORANDUM

CFTC Supplements Proposed Amendments to Position Aggregation Rules

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The Commodity Exchange Act directs the Commodity Futures Trading Commission to establish limits on the number of commodity interest positions that may be held for speculative purposes by one trader or a group of traders who are acting in concert. Proposed rules related to position limits and position aggregation have been pending since late 2013. The CFTC recently released a supplement[1] to its November 2013 proposal to amend the position aggregation rules.[2] CFTC aggregation rules specify when a trader's futures and options on futures positions must be combined with those of another trader for purposes of determining compliance with speculative position limits.[3] The proposed modifications in the

1 CFTC Supplemental Notice of Proposed Rulemaking: Aggregation of Positions, 80 Fed. Reg. 58365 (Sept. 29, 2015) (the "Supplement").

2 CFTC Notice of Proposed Rulemaking: Aggregation of Positions, 78 Fed. Reg. 68946 (Nov. 15, 2013) (the "2013 Aggregation Proposal"). For more information on the CFTC's post-Dodd-Frank rule makings related to speculative position limits, please see our client memoranda entitled "CFTC Proposes Amendments to Position Aggregation Rules" (Dec. 16, 2013); "Court Vacates and Remands CFTC Position Limit Rule" (Oct. 1, 2012); "CFTC Proposes Modifications to Position Limit Aggregation Rules" (May 31, 2012); "CFTC Adopts Final Rules on Position Limits" (Nov. 17, 2011); and "CFTC Adopts Final Rules on Position Limits; Independent Account Controller Exemption Retained" (Oct. 19, 2011).

3 In December 2013, the CFTC proposed amendments to Part 150 that would establish position limits on 28 exempt and agricultural commodity futures and option contracts and the physical commodity swaps that are economically equivalent to such contracts. If adopted, the amendments in the Supplement would also apply to those positions.

Supplement would generally make it easier for a trader with an ownership interest of more than 50% in another entity to avail itself of an aggregation exemption. Comments on the Supplement are due by November 13, 2015.

Current Aggregation Requirements and Exemptions

The CFTC's Part 150 rules generally require a trader to aggregate, absent an exemption, all positions the trader owns or controls. The owned entity exemption provides that an owner of less than 10% of an entity (an "owned entity")[4] is generally not required to aggregate the positions of the owned entity with such trader's other positions.

The 2013 Aggregation Proposal

The 2013 Aggregation Proposal, among other things, proposed new exemptions that would generally provide aggregation relief where (i) a trader has an ownership interest of between 10% and 50% in an owned entity or (ii) a trader has an ownership interest of more than 50% in an owned entity.

A trader with an ownership interest between 10% and 50% would generally not be required to aggregate its positions with its owned entity's positions, provided that certain conditions were met. The trader would have to file a notice with the CFTC, which would be effective upon filing.

A trader with an ownership interest of more than 50% would not have to aggregate its positions with its owned entity's positions subject to several conditions, including that the owned entity was not consolidated in the financial statements of such trader and each representative of the trader-owner on the owned entity's governing body certified that he or she did not control the trading decisions of the owned entity. Any trader seeking to rely on this exemption would have had to file a claim with, and receive the approval of, the CFTC.

The Supplement

The Supplement modifies the 2013 Aggregation Proposal to eliminate, among other things, the financial statement and certification requirements in respect of greater than 50% owned entities. Thus, the CFTC is now proposing that any trader with an ownership interest of 10% or more would not have to aggregate commodity interest positions of an owned entity with any of its other positions, provided that both the trader and the owned entity:

- do not have knowledge of the trading decisions of the other;
- trade pursuant to separately developed and independent trading systems;
- have and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about trades of the other;

4 Other exemptions from aggregation may be available to commodity pool investors.

- do not share employees who control the trading decisions of either; and
- do not have risk management systems that permit the sharing of trades or trading strategies.

Each trader claiming such exemption would have to file a notice with the CFTC, which would be effective upon filing. Any other trader whose positions must be aggregated with the trader claiming the owned entity exemption would have to satisfy the same requirements.

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